United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

920

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23178

UNITED STATES OF AMERICA,

Appellee,

vs.

RODNEY SINCLAIR,

Appellant.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 29 1969

Nathan J. Paulson
CLERK

STANLEY KLAVAN
22 West Jefferson Street
Rockville, Maryland 20850

Attorney for Appellant
(Appointed by this Court)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Appellee,	:	
	:	
vs.	:	Case No. 23178
	:	
	:	
RODNEY SINCLAIR,	:	
	:	
Appellant.	:	

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STANLEY KLAVAN
22 West Jefferson Street
Rockville, Maryland 20850

Attorney for Appellant
(Appointed by this Court)

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APPLICABLE STATUTES

District of Columbia Code (1967 Ed.)

§22-1801. Burglary - Penalties.

"(a) Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than five years nor more than thirty years.

"(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years."

District of Columbia Code (1967 Ed.)

§22-3102. Unlawful entry on property.

> "Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $100 or imprisonment in the jail for not more than six months, or both, in the discretion of the court."

Federal Rules of Criminal Procedure

Rule 30. Instructions

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to

consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

Federal Rules of Criminal Procedure

Rule 31. Verdict

"(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23178

UNITED STATES OF AMERICA,

Appellee,

vs.

RODNEY SINCLAIR,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in failing to give a requested charge on the lesser included offense of unlawful entry when defendant was charged with second degree burglary?

REFERENCE TO RULING

1. The oral ruling in which the Court below set forth the basis of the judgment presented for review was made on January 6, 1969, and can be found at pages 75-77 of the transcript.

* This case was not previously before this Court.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction of the crime of burglary in the second degree. Following the jury's verdict of guilty as charged in the indictment on February 28, 1969, defendant was sentenced to a term of imprisonment from two to six years, said sentence to be served consecutively with a sentence imposed in another case. Defendant's motion for bail pending appeal was denied on April 9, 1969, and defendant is presently incarcerated at Lorton Reformatory where he is serving a sentence imposed in Criminal Case No. 1225-66.

The defendant was charged with entering a men's clothing store, University Shop, located at 1316 G Street, N.W., Washington, D.C., on April 5, 1968, with the intent to commit a criminal offense therein. At trial, it was shown that on April 5, 1968, defendant left his family's residence at 2001 Maryland Avenue, N.E., at 11:00 a.m. in a car borrowed from his brother. (Tr. 52, 57, 58) Defendant was employed at a Giant Food store but was not working that day. (Tr. 52) After a stop at a "7-11" store and a Burger-Chef (Tr. 58), defendant invited four persons to ride with him. (Tr. 52) The car left the vicinity of 7th and O Streets (Tr. 45) and proceeded across town on M Street (Tr. 53) to 14th Street. (Tr. 53)

The defendant noticed considerable looting (Tr. 54) and numerous people on the streets as he turned onto 14th Street going downtown. (Tr. 54) At the 1300 block of G Street, the defendant stopped his car (Tr. 59), not directly in front of the University Shop, but on the side (Tr. 54) as he noticed "there were a lot of clothes on the sidewalk and in the street." (Tr. 54) The defendant testified that he got out of the car and began walking and picking up a few things on the sidewalk. (Tr. 54)

The defendant asserts further that one Officer Cornish, who had pulled up in a police car in front of the University Shop (Tr. 11), asked him who was in the store and at the defendant's profession of ignorance forced him into the store at gunpoint where he was made to lie face down on the floor. (Tr. 55)

The defendant testified that inside the store his driver's license was surrendered as identification to Officer James Orman who tore it up and who hit the defendant on the head with his stick. (Tr. 55) After having had both Officer Cornish and Officer Orman curse him (Tr. 55), the defendant states that he was taken out of the store. (Tr. 56)

The arresting officer, Herman Floyd Cornish of the Metropolitan Police Department, testified that on April 5, 1968, he

was cruising in the 1300 block of G Street, N.W., when he saw three men running away from the University Shop. His partner chased them. (Tr. 8) Officer Cornish entered the University Shop through a show window (Tr. 13) and as he was proceeding to the rear, a man whom he identified as the defendant and whom he described as hiding behind a clothes rack tried to make an exit on tip toes. (Tr. 8, 13) The officer also testified that the defendant had nothing in his arms and hands and there was no evidence to indicate that he might have been in the process of taking anything. (Tr. 17) Officer James W. Orman likewise testified that the defendant had nothing in his hands at the time of his arrest. (Tr. 33, 34)

In his instructions to the jury, the trial judge read the indictment charging burglary in the second degree (Tr. 75); quoted the pertinent part of Title 22, Section 1801 of the District of Columbia Code; explained the essential elements of burglary in the second degree (Tr. 76); but, when a timely request was made by trial counsel for instruction as to a lesser included offense (Tr. 76), the Court denied the request. (Tr. 77)

ARGUMENT

I

UNLAWFUL ENTRY IS A LESSER INCLUDED OFFENSE WITHIN BURGLARY IN THE SECOND DEGREE, AND DEFENDANT WAS ENTITLED TO HAVE THE JURY CONSIDER THIS ALTERNATIVE

Rule 31(c) of the Federal Rules of Criminal Procedure provides that "The defendant may be found guilty of an offense necessarily included in the offense charged . . ." For a lesser offense to be included within the offense charged, it "must be such that the greater offense cannot be committed without also committing the lesser." Crosby vs. United States, 119 U.S. App. D.C. 244, 245, 339 F.2d 743, 744 (1964). Accord, Kelly vs. United States, 125 U.S. App. 205, 370 F.2d 227 (1966), cert. denied 388 U.S. 913. For instance, an indictment for assault with intent to kill or murder would permit the defendant to be convicted of simple assault, as the elements of the latter offense are included within those of the former. United States vs. Cropley, C.C. Dist. Col. 1835, Fed. Cas. No. 14892. Likewise, an indictment for felonious entry and the taking of goods from a warehouse admits of the lesser included offense of simple larceny, United States vs. Read, C.C. Dist. Col. 1820, Fed. Cas. No. 14968, and an indictment for burglary permits the jury to find the defendant guilty of only larceny. United

States vs. Dixon, C.C. Dist. Col. 1807, Fed. Cas. No. 14968.

Here, the offense of unlawful entry on property, as described in the District of Columbia Code, Section 22-3102:

> "Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof . . ."

is a lesser offense, the elements of which are necessarily to be found within those of the greater charged offense, burglary. See United States vs. Markis, 352 F.2d 860, (2nd Cir. 1965).

II

UNLAWFUL ENTRY IS DISTINGUISHED FROM SECOND DEGREE BURGLARY PRIMARILY BY THE ABSENCE OF MENS REA AT THE TIME OF ENTRY, AND HERE THE JURY MIGHT REASONABLY HAVE CONCLUDED FROM ALL THE TESTIMONY THAT THE DEFENDANT DID NOT HAVE THE REQUISITE INTENT FOR THE GREATER OFFENSE

(Defendant desires the Court to read pages 5, 8, 15, 17, 33-35, 75-76 of the Reporter's Transcript)

The primary distinction between the two offenses of second degree burglary and unlawful entry is that in the greater offense the defendant at the time of entry has the criminal intent to commit another offense inside. Sansone vs. United States, 380 U.S. 343 (1965); United States vs. Markis, supra.

While an instruction on a lesser included offense is proper only when there is evidence to justify it, Burcham vs. United States, 82 U.S. App. D.C. 283, 163 F.2d 761 (1947), here such an instruction was justified as the jury could have concluded from the evidence that defendant lacked the requisite intent at the time of entry. Admittedly, the defendant lacked permission to enter the store. (Tr. 5) A finding was justified that the defendant was present on another's property unlawfully and against the other's will. However, the jury could also have inferred that the defendant had formed no criminal intent prior to entry, thus making his offense nothing more than unlawful entry. See Felkner vs. State, 218 Md. 300, 146 A.2d 424, 429 (1958). Such an inference could have been made from the testimony of Officers Cornish (Tr. 15, 17) and Orman (Tr. 33-35) to the effect that at no time did the defendant have on his person or in his possession a weapon or burglary tools or any of the store's merchandise and because the officers had no indication that he was in the process of taking anything when he was apprehended inside the store.

III

THE JURY, NOT THE TRIAL COURT, SHOULD HAVE DETERMINED WHETHER THERE WAS A SUFFICIENT SHOWING THAT DEFENDANT POSSESSED MENS REA AT THE TIME OF ENTRY

(Defendant desires the Court to read pages 5, 15, 17, 33-35, 55-57 of the Reporter's Transcript)

The trial withdrew from the jury the question of the defendant's possession or lack of possession of criminal intent.

"However implausible, unreliable or incredible, only the jury had the right to make the evaluation of (defendant's) testimony." Young vs. United States, 114 U.S. App. D.C. 42, 43, 309 F.2d 662, 663 (1962). See also Kinnard vs. United States, 68 App. D.C. 250, 96 F.2d 522 (1938), and Stevenson vs. United States, 162 U.S. 313 (1896).

The jury, from the defendant's testimony as to the events of April 5, 1968 (Tr. 55-57), from Officers Cornish and Orman's uncontradicted testimony as to the defendant's never in their presence having had on his person store clothing or a weapon of any sort (Tr. 15, 17, 33-35), and from store owner Rosenthal's testimony as to never having permitted the defendant to have entered his store (Tr. 5), could have reasonably believed that the defendant had unlawfully entered onto the property of store owner Rosenthal but with no breaking nor criminal intent. The jury, in other words, could have found the defendant guilty of only the lesser included offense of unlawful entry but, by reason of the trial court's failure to instruct them as to the lesser offense, were unable to do so. The choice as to what portions of the evidence or testimony to believe is exclusively a jury choice and when, as here, all the elements for instructing the jury as to the lesser offense are present, refusal so to instruct is reversible error. As was said in Young vs. United

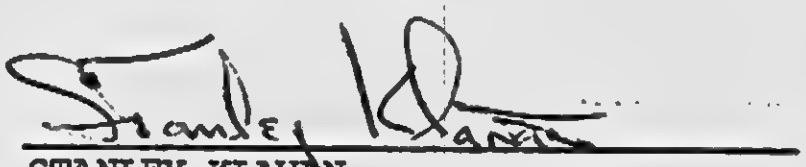
States, supra, at 663:

> "The ruling denying the lesser included offense instruction necessarily involved an appraisal of . . . evidence and . . . credibility by the District Judge but the trier cannot withdraw that appraisal from the jury."

CONCLUSION

In view of the foregoing, the distinction between the two offenses depends upon an evaluation of the defendant's criminal intent, or lack of it, at the time of his entry into the store. This evaluation should have been left to the jury. The judgment of the Court below should be reversed and the case remanded for another trial.

Respectfully submitted,

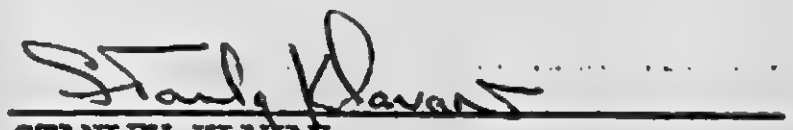


STANLEY KLAVAN
22 West Jefferson Street
Rockville, Maryland 20850

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant was delivered to the Office of the United States Attorney, United States Courthouse, 3rd & Constitution Avenue, N.W., Washington, D.C., this 29th day of September, 1969.



STANLEY KLAVAN
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,178

UNITED STATES OF AMERICA, APPELLEE

v.

RODNEY SINCLAIR, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JAMES R. PHELPS,
Assistant United States Attorneys.

RICHARD L. ROSENFIELD,
Attorney, Department of Justice.

Cr. No. 618-68

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

Was it error for the trial court not to instruct the jury on unlawful entry as a lesser included offense of burglary in the second degree?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,178

UNITED STATES OF AMERICA, APPELLEE

v.

RODNEY SINCLAIR, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a one-count indictment filed May 21, 1968, appellant was charged with burglary in the second degree. On January 7, 1969, after a jury trial before Judge Oliver Gasch, appellant was found guilty as indicted. On February 28, 1969, appellant was sentenced to imprisonment for a term of two to six years, such sentence to be served consecutively with a sentence in another case for robbery, assault with a dangerous weapon, and carrying a dangerous weapon. This appeal followed.

The evidence adduced at trial revealed that on Friday, April 5, 1968, during a period of riots and looting

in the District of Columbia, the University Shop, a clothing store located at 1318 G Street, N.W., closed for business at 1:30 p.m. (Tr. 4). The doors were locked, and the interior of the store was in normal business order (Tr. 5-6). Officer Herman Cornish of the Metropolitan Police Department testified that he and three other police officers patrolling the streets at 8:30 p.m. noticed three persons running from the University Shop (Tr. 8).[1] While the other officers chased these persons, Officer Cornish proceeded to the shop itself (Tr. 8). The door was locked, and he entered through the broken showcase windows (Tr. 13). The officer found appellant inside the store hiding behind a clothes rack (Tr. 8). He was arrested when he tried to sneak by the officer on his tip-toes when the officer entered[2] (Tr. 15). Appellant was not carrying any merchandise when apprehended but told the officer "that he was just doing what everyone else was doing" (Tr. 17). The interior of the store was in disarray (Tr. 29).

Testifying in his own behalf, appellant said that he and five others were out driving on the evening of April 5, 1968. As they drove, they observed "a lot of looting" (Tr. 53). They parked on the side of the University Shop and left the car (Tr. 54). Appellant testified that there were a lot of clothes on the sidewalk and in the street and that he was in the process of "pick[ing] up a few things" when he was apprehended. He said that he was taken into the store at gunpoint[3] (Tr. 55).

Appellant's request for an instruction on an unspecified lesser included offense was denied (Tr. 77).[4]

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[1] One of the other policemen testified that he observed two of these persons carrying merchandise.

[2] This version of events was corroborated by the testimony of another officer (Tr. 28-29, 32-34).

[3] Janice Butler, a companion that evening, testified that she never saw the appellant inside the store (Tr. 47-48).

[4] We assume *arguendo* that defense counsel was seeking an instruction on unlawful entry as a lesser included offense within second-degree burglary.

ARGUMENT

Under the circumstances, the trial court properly refused to instruct the jury on unlawful entry as a lesser included offense of burglary.

Rule 31(c) of the Federal Rules of Criminal Procedure provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." In construing this rule, the United States Supreme Court noted in *Sansone* v. *United States*, 380 U.S. 343, 351 (1964):

> A lesser-included offense instruction is only proper where the charged offense requires the jury to find a *disputed* factual element which is not required for conviction of the lesser-included offense. [Emphasis added.]

While it is true, as appellant notes, that "for a lesser offense to be included within the offense charged, it 'must be such that the greater offense cannot be committed without also committing the lesser'" (Br. 5), one is nevertheless not entitled to an *instruction* on a lesser included offense unless it is justified by the evidence in the particular case. *Berra* v. *United States*, 351 U.S. 131, 134 (1956); *Sparf* v. *United States*, 156 U.S. 51 (1893); *Driscoll* v. *United States*, 356 F.2d 324 (1st Cir. 1966).

Thus, while it is possible under a murder indictment for the defendant to be convicted of only simple assault (Br. 5), and while an indictment for felonious entry and the taking of goods from a warehouse "admits of the lesser included offense of simple larceny" and an "indictment for burglary permits the jury to find the defendant guilty of only larceny" *(id.)*, nevertheless the one essential qualifying characteristic is that the lesser included offense instruction must be justified by the evidence in each particular case. Accordingly, not all murder indictments necessitate an assault or manslaughter

instruction, nor do all burglary indictments require the jury to be instructed on unlawful entry.[5]

In *Sparf* v. *United States*, *supra*, the Supreme Court reviewed a conviction for murder. Refusing to reverse the conviction for failure of the trial court to give a manslaughter instruction upon request of the defendant, the Court observed:

> A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law. 156 U.S. at 63-64.

See *Belton* v. *United States*, 127 U.S. App. D.C. 201, 382 F.2d 150 (1967); *Kelly* v. *United States*, 125 U.S. App. D.C. 205, 370 F.2d 227 (1966), *cert. denied*, 388 U.S. 913 (1967).

The controlling factor as to whether a lesser included offense instruction is required in a given case is whether or not there is a dispute in the evidence on the factual element needed to distinguish the greater from the lesser offense. In the instant case the element which distinguishes the greater offense (burglary) from the lesser offense (unlawful entry) is the element of intent to commit a criminal offense within the store. Under the evi-

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[5] In *United States* v. *Markis*, 352 F.2d 860 (2d Cir. 1965), the Second Circuit held that *Sansone's* requirement of a "disputed factual element" referred to something more than the mere submission of guilt or innocence to the jury. The court stated: "The mere fact that the jury was still free to disbelieve [the] testimony does not elevate the issue to a truly 'disputed' one . . . . The lesser-included offense charge is not required simply because the jury could exercise its power of acquitting on the greater charge . . . ." 352 F.2d at 867 (citations omitted).

dence adduced at trial, however, this element was undisputed. The police officers testified that during a period in which the store was closed and the door was locked, they entered through a broken window and found appellant crouched behind a clothes rack. Appellant then attempted to sneak past them. Upon apprehension, appellant remarked that he "was just doing what everyone else was doing." Appellant's evidence indicated that after observing "a lot of looting," he had stopped his automobile near the University Shop and, seeing clothing lying on the street, he began "pick[ing] up things" (Tr. 54). He contested, however, the officers' testimony that he was found within the store.

In this posture the case left only one disputed issue—whether or not the appellant ever entered the store on his own volition. In order for the jury to have found the defendant guilty of *either* unlawful entry or burglary the jury had to resolve this issue against appellant. In short, the factual issues to be resolved for both the lesser and the greater offenses were identical. See *Sansone*, *supra*, 380 U.S. at 352-353. Put simply, the Government's case revealed that appellant was within the store with intent to loot, while appellant's case indicated that he was looting outside the store. If the jury believed that appellant was in the store, the evidence admitted of no rational conclusion other than that he possessed the requisite criminal intent. If the jury believed appellant's testimony that he was not found within the store, they would have acquitted him. The jury resolved this issue against appellant.

In all the cases cited by appellant where an instruction on a lesser included offense was required, there was some evidence which would justify such an instruction. Where no such evidence exists, the request for a lesser included offense instruction is properly denied. *MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951); *Burcham* v. *United States*, 82 U.S. App.

D.C. 283, 163 F.2d 761 (1947); *Driscoll* v. *United States*, *supra*.[6]

The evaluation of appellant's criminal intent was never withdrawn from the jury. The trial judge instructed the jury *inter alia* that the Government had to prove beyond a reasonable doubt that, at the time of entering the store, the defendant possessed "the specific intent to break or carry away any part of the building, or any fixture, or any other thing connected with the building" or that he "had the specific intent to commit any criminal offense therein" (Tr. 76). Under the circumstances, appellant's rights were adequately protected.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JAMES R. PHELPS,
Assistant United States Attorneys.

RICHARD L. ROSENFIELD,
Attorney, Department of Justice.

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[6] In *Driscoll* the Court held:

> When the government has made out a compelling case, uncontroverted on the evidence, on an element required for the charged offense but not for the lesser-included offense, there is the duty on defendant to come forward with some evidence if he wishes to have the benefit of a lesser included offense charge. To put it another way, while a judge cannot prevent a jury from rejecting the prosecution's entire case, he is not obligated, under these circumstances, to assist a jury in coming to an irrational conclusion of partial acceptance and partial rejection of the prosecution's case by giving a lesser included offense instruction. 356 F.2d at 327.

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